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4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

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7 STEVENSON FISHER,

8 Plaintiff,

9 v.

10 MJ CHRISTENSEN JEWELERS, LLC, *et*  
11 *al.*,

12 Defendants.

Case No. 2:15-cv-00358-RFB-NJK

**ORDER**

Plaintiff's Motion to Certify Class (ECF No. 112), Defendant's Motion for Summary Judgment (ECF No. 117)

13  
14 **I. INTRODUCTION**

15 Before the Court is Plaintiff's Motion to Certify Class (ECF No. 112) and Defendant Le  
16 Vian Corporation's Motion for Summary Judgment (ECF No. 117). For the reasons stated below,  
17 Plaintiff's Motion to Certify Class (ECF No. 112) is GRANTED, and Defendant's Motion for  
18 Summary Judgment (ECF No. 117) is DENIED without prejudice.

19  
20 **II. BACKGROUND**

21 This case was removed to federal court on February 27, 2015. (ECF No. 1). Plaintiff's  
22 Second Amended Complaint, filed on November 17, 2015 (ECF No. 47), asserts the following  
23 claims, on a class-wide basis, against Defendants MJ Christensen Jewelers LLC ("MJC"), Le Vian  
24 Corporation ("Le Vian"), and LX Publications, LLC ("LX"): (1) violation of the Telephone  
25 Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. 227; and (2) violation of the Nevada  
26 Deceptive Trade Practices Act ("NVDTPA"), NRS Chapter 598.

27 Plaintiff filed his Motion to Certify Class (ECF No. 112) on November 18, 2016, on the  
28 close of discovery. Defendant Le Vian Corporation Responded on December 19, 2016. (ECF No. 119). Plaintiff Replied in support of class certification on January 16, 2017. (ECF No. 127).

1 Defendant Le Vian Corporation filed its Motion for Summary Judgment on December 19,  
2 2016. (ECF No. 117). Plaintiff Responded on January 23, 2017. (ECF No. 128). Defendant Replied  
3 on February 6, 2017. (ECF No. 130).

4 The Court held a hearing on the Motion for Class Certification on July 25, 2017.

### 5 6 **III. CLASS CERTIFICATION**

#### 7 **A. Factual Allegations**

8 The following facts are alleged in Plaintiff's Amended Complaint and Motion for Class  
9 Certification. Le Vian designs and manufactures jewelry, which it sells wholesale to retailers. MJC  
10 is an independent Las Vegas retailer that began selling Le Vian's jewelry in the summer of 2014.  
11 In the fall of 2014, MJC informed Le Vian that it would like to host a sales event on December 4,  
12 2014 at MJC's store, featuring Le Vian jewelry ("trunk show"). To promote the trunk show, MJC  
13 paid LX, an independent marketing vendor, to invite MJC's customers via mail and a telephone  
14 message recorded by MJC's owner. Plaintiff is pursuing MJC and Le Vian on theories of vicarious  
15 liability, based on allegations that their marketing programs for the trunk show directed a phone  
16 blast that was conducted by LX.

17 MJC provided LX (1) a prerecorded voice message advertising the Le Vian trunk show  
18 and (2) spreadsheets with MJC customer information. LX called consumers with the prerecorded  
19 message. MJC provided LX two separate spreadsheets. One was a spreadsheet of MJC customer  
20 phone numbers from MJC's customer database. The list contained approximately 13,000 phone  
21 numbers ("Phone Number Spreadsheet"). The second spreadsheet was for a mailer, and contained  
22 the names and addresses of the same MJC customers whose phone numbers were in the phone  
23 number spreadsheet ("Mailer Spreadsheet"). In the course of discovery in this litigation, MJC has  
24 produced a spreadsheet with combined information from the Phone Number Spreadsheet and the  
25 Mailer Spreadsheet.

26 LX emailed a company called CallMultiplier, regarding the "MJ Christensen Call", and  
27 instructed CallMultiplier to schedule a call for December 3, 2014 at 12:00 PST, using the caller  
28 ID of MJC's phone number. CallMultiplier ultimately transmitted a total of 8,225 calls. LX paid

1 CallMultiplier for transmitting the calls. A different company, FullTel, Inc., made 6,805 of the  
2 calls, including the call to Plaintiff Fisher. FullTel provided a spreadsheet in discovery containing  
3 6,805 rows of data, including the date and the time of the call, the calling party phone number, the  
4 called party phone number, and the call disposition (answered, busy, etc). CallMultiplier provided,  
5 in discovery in this litigation, the call detail records for the remainder of the calls in the form of a  
6 spreadsheet indicating the date, time, phone number of the called party, and result (failed or  
7 succeeded).

8 Plaintiff Fisher received the call on his cell phone on December 3, 2014, at 12:30 pm, while  
9 he was at his home in Las Vegas, Nevada. The call came from MJC's phone number. When he  
10 answered, Plaintiff heard a prerecorded voice message, in which a voice identified himself as Cliff  
11 Miller with MJC promoting a Le Vian VIP event for Thursday, December 4, 2014. Fisher has no  
12 relationship with MJC and has never given MJC consent to call his cell phone. Fisher has no  
13 relationship with Le Vian and has never given Le Vian consent to call him.

#### 14 **B. Legal Standard**

15 Class certification is governed by Federal Rule of Civil Procedure 23. Under Rule 23(a),  
16 the party seeking certification must demonstrate, first, that: (1) the class is so numerous that joinder  
17 of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the  
18 claims or defenses of the representative parties are typical of the claims or defenses of the class,  
19 and (4) the representative parties will fairly and adequately protect the interests of the class. The  
20 proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Here,  
21 Plaintiff seeks to certify a class based on either 23(b)(2) or 23(b)(3).

22 The Supreme Court has "cautioned that a court's class certification analysis must be  
23 rigorous and may entail some overlap with the merits of the plaintiff's underlying claim," however,  
24 "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification  
25 stage." Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 133 S. Ct. 1184, 1195 (2013) (internal  
26 quotation marks and citations omitted). "Merits questions may be considered to the extent – but  
27 only to the extent – that they are relevant to determining whether the Rule 23 prerequisites for  
28 class certification are satisfied." Id. "Rule 23 does not set forth a mere pleading standard." Wal-

1 mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011). Rather, “[a] party seeking class  
2 certification must affirmatively demonstrate his compliance with the Rule – that is, he must be  
3 prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or  
4 fact, etc.” Id. (alteration in original).

### 5 **C. Discussion**

6 Plaintiff Fisher seeks certification of a class of consumers who received telemarketing calls  
7 from Defendants using a prerecorded voice message. Specifically, Plaintiff asks the Court to  
8 certify the following national class: All persons residing in the United States who received a  
9 telephone call made using a prerecorded voice or automated telephone dialing system by or on  
10 behalf of Defendants, on or after January 20, 2011. Plaintiff asks additionally, or else alternatively,  
11 that the Court certify the following subclass: All persons residing in Nevada who received a  
12 telephone call made using a prerecorded voice or automated telephone dialing system by or on  
13 behalf of Defendants, on or after January 20, 2011. Plaintiff requests that the following persons be  
14 excluded from all class definitions: (a) any employees, officers, or directors of the Defendants; (b)  
15 any attorney appearing in this action; and (c) any judge assigned to hear any aspect of this action.

16 Plaintiff claims that the call at issue violated the TCPA because it was made using an  
17 autodialer, without his prior express consent. See 47 U.S.C. § 227(b)(1)(A). Defendant Le Vian  
18 opposes class certification on the following grounds: (a) Plaintiff has not established a class that  
19 is ascertainable by reference to objective criteria without resort to numerous individualized, fact-  
20 intensive questions; (b) Plaintiff seeks to broaden the class impermissibly beyond the class  
21 definition set forth in the operative Complaint; and (c) the proposed class includes calls where no  
22 violation of the TCPA could have occurred because MJC had consent to call the number.  
23 Defendant further argues that the Rule 23(a) prerequisites are not met. Defendant also argues that  
24 the class should not be certified under Rule 23(b)(2) because it is not primarily seeking injunctive  
25 relief, but rather, monetary damages. Finally, Defendant argues that the class should not be  
26 certified under Rule 23(b)(3) because Plaintiff has failed to establish that common issues  
27 predominate and that a class action would be a superior mechanism for resolving the allegations.  
28 The Court considers each of these arguments in turn.

1                   **1. Impermissible Expansion Beyond Complaint’s Definition**

2                   Le Vian argues that Plaintiff impermissibly seeks to expand the class beyond the definition  
3 in the Complaint. Le Vian argues that the Complaint was limited to calls to cell phones, whereas  
4 Plaintiff’s new definition includes calls to residential landlines, which are discussed in a different  
5 subsection of the TCPA.

6                   The operative Complaint does state that the “proposed class action [is] brought on behalf  
7 of consumers that received telemarketing calls to their cell phones made using a prerecorded voice  
8 or automated dialing system by or on behalf of Defendants, for which calls the Defendants never  
9 obtained express, written consent from the consumers.” Plaintiff argues that the TCPA does not  
10 distinguish between cell phones and landlines when callers use a prerecorded voice, and that even  
11 though a different subsection of the same statute refers to cell phones, the distinction is without a  
12 difference in terms of rights under the statute. The TCPA contains parallel provisions which are  
13 nearly identical in language, and which address cell phones, and landlines, respectively:

14                   “‘It shall be unlawful for any person within the United States, or any person outside the  
15 United States if the recipient is within the United States – (A) to make any call (other than  
16 a call made for emergency purposes or made with the prior express consent of the called  
17 party) using any automatic telephone dialing system or an artificial or prerecorded voice...  
18 (iii) to any telephone number assigned to a ... cellular telephone service... (B) to initiate  
19 any telephone call to any residential telephone line using an artificial or prerecorded voice  
20 to deliver a message without the prior express consent of the called party, unless the call is  
21 initiated for emergency purposes...” 47 U.S.C. § 227(b)(1)(A)-(B).

22                   Le Vian argues that expanding the class to include landlines would prejudice Defendants  
23 because Plaintiff previously refused to respond to discovery in this case inquiring as to landlines.  
24 However, as discussed at the hearing on this motion, that specific discovery request only pertained  
25 to Plaintiff Fisher, who was contacted on his cell phone, not on a landline. Defendants have been  
26 on notice of the set of marketing calls, including calls to landlines, that Plaintiff was targeting in  
27 his Complaint, although the original class definition does not specify that it will include landlines.  
28 There are statutory exemptions that would apply to calls made to residential landlines, which  
would not apply to calls made to cell phones; however, at the hearing on this motion, parties  
represented that those exemptions are not at issue in this litigation. Therefore, the Court does not

1 find that Defendants would be prejudiced by a class definition that includes both landlines and cell  
2 phones.

### 3 **2. Ascertainability**

4 Defendant Le Vian argues that the class is overbroad and not ascertainable because it  
5 includes every recipient of a prerecorded message from any of the Defendants since January 20,  
6 2011. A class must be ascertainable; in Le Vian's view, ascertainability requires the application of  
7 objective criteria rather than engaging in fact-specific inquiry. Plaintiff contends that class  
8 membership can in fact be determined by a variety of objective criteria, including the MJ  
9 Christensen spreadsheets provided in discovery, FullTel and CallMultiplier call detail records, and  
10 simple administrative procedures using the called phone numbers to identify class members. The  
11 documents indicate what numbers were called, as well as the names, phone numbers, and addresses  
12 associated with the phone numbers from MJC's customer database. Therefore, the class appears  
13 to be clearly ascertainable. Furthermore, many of Le Vian's arguments as to ascertainability appear  
14 to, in fact, be arguments going to the administrative feasibility of the determining the class. The  
15 Ninth Circuit has held that class proponents are not required to demonstrate that there is an  
16 administratively feasible way to determine who is in the class in order for the class to be certified.  
17 See Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1123 (9th Cir. 2017).

18 Le Vian argues that the proposed class includes a substantial number of people who  
19 voluntarily gave their telephone numbers to MJC and therefore have no grievance, and also that  
20 the class goes beyond calls related to the specific trunk show at issue, and would include calls that  
21 have nothing to do with MJC or Le Vian. As to the issue of the overbreadth of the class definition,  
22 Plaintiff has proposed, in his Reply briefing, a limitation of the class to those who received a call  
23 regarding the Le Vian trunk show at MJ Christensen to be held on December 4, 2014, which call  
24 was received on or about December 3, 2014. The Court finds this to be an appropriate limitation.  
25 The class will be limited to those specifically affected by the December 3, 2014 phone blast. As to  
26 issues of consent, Defendant Le Vian has not provided specific evidence of people who voluntarily  
27 gave their telephone number. See, e.g., Meyers v. Portfolio Recovery Assocs., LLC, 707 F.3d  
28 1036, 1042 (9th Cir. 2012) (rejecting the argument that individualized issues of consent preclude

1 a finding of typicality or commonality where defendant did not show instances where express  
2 consent was given before calls were placed).

### 3 **3. Rule 23(a) Factors**

#### 4 ***a. Numerosity***

5 Numerosity requires that the proposed class be so numerous that joinder of all class  
6 members in the action is impracticable. Fed. R. Civ. P. 23(a)(1). There is no set numerical cutoff  
7 used to determine whether a class is sufficiently numerous. Courts must examine the specific facts  
8 of each case. See General Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 330 (1980).

9 Le Vian does not challenge whether the numerosity requirement would be met by the  
10 proposed class in this case, which would consist of at least 8,225 consumers who received the  
11 December 3, 2014 phone blast. Therefore, the Court finds that this requirement is met.

#### 12 ***b. Commonality***

13 “The commonality and typicality requirements of FRCP 23(a) tend to merge, but they both  
14 serve as guideposts for determining whether under the particular circumstances maintenance of a  
15 class action is economical and whether the named plaintiff’s claim and the class claims are so  
16 interrelated that the interests of the class members will be fairly and adequately protected in their  
17 absence.” Meyer v. Portfolio Recovery Assocs., LLC, 707 F.3d 1036, 1041 (9th Cir. 2012)  
18 (quoting Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 n.5 (2011)) (quotation marks  
19 omitted). “All questions of fact and law need not be common to satisfy the commonality  
20 requirement. The existence of shared legal issues with divergent factual predicates is sufficient, as  
21 is a common core of salient facts coupled with disparate legal remedies within the class. . . . The  
22 common contention must be of such a nature that it is capable of classwide resolution – which  
23 means that determination of its truth or falsity will resolve an issue that is central to the validity of  
24 each one of the claims in one stroke. . . . Representative claims are typical if they are reasonably  
25 co-extensive with those of absent class members; they need not be substantially identical.” Id. at  
26 1041-42 (citations and quotation marks omitted).

27 Plaintiff argues that there are numerous common questions of law and fact, for example:  
28 whether Defendants used a prerecorded voice to make the calls at issue; whether Defendants used

1 an automatic dialing system to make the calls; whether the calls were telemarketing calls; whether  
2 the class members provided express, written consent to receive the calls; and whether Plaintiff and  
3 class members are entitled to damages under the TCPA. Defendant Le Vian argues that consent is  
4 a key issue that cannot be determined on a class-wide basis. Several of Le Vian's arguments relate  
5 to inclusion of class members to whom calls were made prior to 2014, which is a moot argument  
6 since the Court is limiting the class to members who received the marketing call on December 3,  
7 2014. Defendant also argues that consent that was provided prior to October 16, 2013, would have  
8 applied to numbers called on December 3, 2014, and has shown four numbers which were provided  
9 prior to 2013 to MJC's electronic database, which would be included in the proposed class. In  
10 Meyer, the Ninth Circuit examined a declaratory ruling issued by the Federal Communications  
11 Commission ("FCC") and determined that absent specific evidence of express consent, arguments  
12 about varying consent amongst class members did not defeat commonality. 707 F.3d at 1042. In  
13 the instant case, MJC testified that it only collected client information on repair tickets and for  
14 customer profiles, and that neither repair tickets nor customer profiles mention MJC calling the  
15 customer about marketing. Therefore, Le Vian has not raised sufficient evidence of individualized  
16 consent variability to defeat commonality.

17 The Court finds that the requirement of commonality is met.

18 *c. Typicality*

19 "Representative claims are typical if they are reasonably co-extensive with those of absent  
20 class members; they need not be substantially identical." Meyer, 707 F.3d at 1042 (citation and  
21 quotation marks omitted). Plaintiff argues that his claims are typical because he received an  
22 automatic dialed call on his cell phone advertising the trunk show.

23 Defendant Le Vian first argues that since Plaintiff's call was received on his cell phone,  
24 his claim is atypical of those received on landlines. However, Defendant has not provided specific  
25 arguments as to why, under the law, these claims would be differentiable, as the Court has  
26 discussed. Defendant also argues that Plaintiff lacks Article III standing given that he suffered no  
27 injury as a result of the alleged violation. In order to have standing, plaintiffs "must have (1)  
28 suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant,



1 and (3) that is likely to be redressed by a favorable judicial decision.” Spokeo Inc. v. Robins, 136  
2 S. Ct. 1540, 1547 (2016) (citations omitted). “Article III requires a concrete injury even in the  
3 context of a statutory violation.” Id. at 1549. A “bare procedural violation, divorced from any  
4 concrete harm” does not satisfy the injury-in-fact requirement. Id. Here, Plaintiff admits he was  
5 not charged for the call and suffered no economic injury as a result; however, he argues that the  
6 intrusion into his privacy was a cognizable injury. “In determining whether an intangible harm  
7 constitutes injury in fact” the Court must look to “whether an alleged intangible harm has a close  
8 relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in  
9 English or American court” as well as Congress’ judgment to “define injuries and articulate chains  
10 of causation that will give rise to a case or controversy.” Id. (citations omitted). The Ninth Circuit  
11 has held, since Spokeo, that a recipient of text messages from a gym satisfied the injury-in-fact  
12 requirement for Article III standing by alleging that the gym owner and marketing company  
13 violated the TCPA by sending him unsolicited text messages on his cellular telephone about a gym  
14 membership. Van Patten v. Vertical Fitness Grp., LLC, 847 F.3d 1037, 1042 (9th Cir. 2017). The  
15 Ninth Circuit’s holding was based on the fact that actions to remedy invasions of privacy and  
16 nuisance have long been heard by American courts, and that the contact, absent consent, presented  
17 precise harm and infringed the same privacy interest Congress sought to protect in enacting the  
18 TCPA. Id. at 1042-43.

19 Therefore, the Court finds that Plaintiff does have standing to bring this lawsuit, and that  
20 his claim is typical of the claims of the proposed class.

#### 21 *d. Adequacy*

22 “Rule 23(a)(4) permits the certification of a class action only if the representative parties  
23 will fairly and adequately protect the interests of the class.” Staton v. Boeing Co., 327 F.3d 938,  
24 957 (9th Cir. 2003) (citation and quotation marks omitted). The Ninth Circuit has instructed an  
25 inquiry into whether “the representative plaintiffs and their counsel have any conflicts of interest  
26 with other class members” and whether “the representative plaintiffs and their counsel [will]  
27 prosecute the action vigorously on behalf of the class[.]” Id. (citation omitted).

28 Le Vian argues that Plaintiff and class counsel are not adequate representatives because

1 Plaintiff was allegedly referred to his counsel as part of a scheme for reporting autodialed calls on  
2 the basis of which to bring a lawsuit. Based on the record of the hearing on this motion, the Court  
3 found that counsel had, at no point, provided any compensation to Plaintiff for his participation in  
4 this lawsuit. Plaintiff voluntarily entered his name and report of the call onto a website which  
5 collected reports of TCPA violations, and he was subsequently connected to his legal  
6 representatives. “Only conflicts that are fundamental to the suit and that go to the heart of the  
7 litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.” In re Online  
8 DVD-Rental Antitrust Litig., 779 F.3d 934, 942 (9th Cir. 2015) (citation and quotation marks  
9 omitted). In that case, the Ninth Circuit held that class representatives were adequate, despite  
10 objections about their \$5,000 incentive awards. Since there were no structural differences in the  
11 claims of the class representatives and the other class members, there was no conflict that would  
12 undermine the class representative’s adequacy. Id. at 943. Defendant has not raised a sufficient  
13 basis for finding a conflict that would make Plaintiff an inadequate class representative.

14 Defendant Le Vian also argues that Plaintiff Fisher’s criminal history renders him  
15 inadequate. Plaintiff pled guilty to his involvement in a robbery of a fast food restaurant. This  
16 occurred in 2007, and Plaintiff has been charged with no crimes since. He successfully completed  
17 probation and on April 20, 2010 received an Order Honorably Discharging Probations with  
18 Restoration of Civil Rights. The charges were reduced to a gross misdemeanor, and Plaintiff served  
19 only probation. The Court does not find that this remote conviction casts doubt on Plaintiff’s  
20 adequacy or credibility as a class representative. This criminal conviction was not related to fraud  
21 or dishonesty. Further, Plaintiff has been an engaged participant in this litigation.

22 Therefore, Plaintiff and class counsel satisfy the adequacy requirement.

#### 23 **4. Analysis of Rule 23(b)(2)**

24 Rule 23(b)(2) provides for class certification when “the party opposing the class has acted  
25 or refused to act on grounds that apply generally to the class, so that final injunctive relief or  
26 corresponding declaratory relief is appropriate respecting the class as a whole . . . .” Fed. R. Civ.  
27 P. 23(b)(2). Le Vian argues that certification under Rule 23(b)(2) would be inappropriate because  
28 the proposed class is primarily interested in recovering monetary damages, and the class lacks the

1 cohesiveness necessary for certification under Rule 23(b)(2). Le Vian argues that an injunction  
2 here is unnecessary and inappropriate because there is no evidence showing any risk of future  
3 violations of the TCPA by Defendants. In two years since the call, Plaintiff has not received any  
4 other calls from Defendants. Although in Meyer the Ninth Circuit found that a TCPA class could  
5 be certified under Rule 23(b)(2), that case upheld the district court's finding that the defendant  
6 would continue to violate the TCPA if an injunction did not issue, and affirmed the granting of  
7 provisional certification of the class under Rule 23(b)(2) for the primary purpose of entering a  
8 preliminary injunction. 707 F.3d at 1045.

9 While Plaintiff has pled injunctive and declaratory relief, those claims are incidental to the  
10 monetary damages claim under the TCPA, which provides for "\$500 in damages for each  
11 violation" which can be trebled if "the defendant willfully or knowingly violated" the TCPA. The  
12 complaint seeks \$12 million in recovery. Furthermore, the Court does not find that there is a  
13 likelihood that the alleged violations in this case would continue in the future. The Court agrees  
14 with Le Vian that Plaintiff has not shown a need for injunctive relief, and that the monetary relief  
15 requested is more than incidental. Rather, damages are fundamental to Plaintiff's case. Thus,  
16 certification under Rule 23(b)(2) is not appropriate in this case.

#### 17 **5. Analysis of Rule 23(b)(3)**

18 Certification under Rule 23(b)(3) is proper when "[1] questions of law or fact common to  
19 class members predominate over any questions affecting only individual members, and that [2] a  
20 class action is superior to other available methods for fairly and efficiently adjudicating the  
21 controversy." Fed. R. Civ. P. 23(b)(3).

22 Defendant Le Vian argues that common questions are defeated based on the fact that some  
23 of the members of the putative class consented to the calls. However, as the Court has discussed,  
24 Defendant has not provided specific evidence of consent defeating commonality. The Court finds  
25 that common questions of law and fact do predominate over questions affecting individual class  
26 members, and certifies the class under Rule 23(b)(3).

27 The Court also finds that all of the reasons noted above to certify the class in this case also  
28 support certification of a subclass limited to Nevada given Plaintiff's receipt of the call in Nevada.

Defendant Le Vian filed its Motion for Summary Judgment prior to the Court's determination of whether or not it would certify a class. While "the district court has discretion to rule on a motion for summary judgment before it decides the certification issue," it need not. Wright v. Schock, 742 F.2d 541, 543-44 (9th Cir. 1984). The Court therefore denies Defendant's Motion for Summary Judgment without prejudice, and with leave to refile in light of the Court's decision on class certification.

IT IS ORDERED that Plaintiff's Motion to Certify Class (ECF No. 112) is GRANTED and the Court certifies the following class, under Fed. R. Civ. P. 23(b)(3): **"All persons residing in the United States who received a telephone call made using a prerecorded voice, regarding the Le Vian trunk show at MJ Christensen to be held on December 4, 2014, which call was received on or about December 3, 2014."** The Court also certifies the following subclass, under Fed. R. Civ. P. 23(b)(3): **"All persons residing in Nevada who received a telephone call made using a prerecorded voice, regarding the Le Vian trunk show at MJ Christensen to be held on December 4, 2014, which call was received on or about December 3, 2014."**

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment (ECF No. 117) is DENIED without prejudice.

DATED: March 6, 2018.



**RICHARD F. BOULWARE, II**  
**United States District Judge**